IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 13 OF 2007.

Mrs. Louisa Maria Maura
Dourado e Pereira,
of fullage, resident of
S. Matias, Belsur,
Piedade, Goa. .... Appellant.

Versus

1. Mrs. Rita Escolastica Teixeira,
   presently at House No.917,
   Maddant, Cortalim, Goa.

2. Audax Damaciano Dourado,
   of full age, Riyad,
   Saudi Arabia. ..... Respondents.

Shri M.B. D'Costa, Senior Advocate with Shri J. A. Lobo, Advocate for the Appellant.

CORAM: S. A. BOBDE, J.

DATE: 15th MARCH, 2007.

ORAL JUDGMENT:

This First Appeal is against the Order of the learned Civil Judge Senior Division, Vasco-da-Gama rejecting the appellant's suit under Order VII, Rule 11(a) and (d) of C.P.C. The appellant has filed the suit for eviction of the defendant upon the dissolution of their marriage.

2. The appellant and the defendant had married each other. Thereafter there was a declaration of annulment of that marriage by the Patriarchal Tribunal of Archdiocese of Goa and Daman and the same was ratified by the Metropolitan

Tribunal of the Archdiocese of Bombay and further confirmed by this Court on 7.6.04. The plaintiff's suit is for eviction of the defendant, his former wife, on the ground that she had no right to stay in the house after the annulment.

3. The defendant applied under Order VII, Rule 11 of C.P.C. and pointed out that the plaintiff had no cause of action to file the suit in view of the provisions of Article 1095 of the Civil Code of 1867. Article 1095 reads as follows :-

> " The annulment of marriage shall have regarding the properties of spouses the same effects which are produced by dissolution of marriage by death. "

The Court accepted that plea and also relied on Article 69 of Decree No.1 dated 25.12.1910 of Family Law which reads as follows :-

> " The annulment of marriage has, as between the spouses likewise in divorce, the same effects as in the case of dissolution of marriage by death, in respect of the properties and persons in part not specifically regulated. "

4. The Court was thus of the view that there is no cause of action for evicting the defendant merely because of the dissolution of the marriage since under the

Family Law applicable to the parties, the annulment has the same effect as dissolution of marriage by death, that is upon such dissolution the surviving spouse becomes entitled to half of the property by virtue of being a moiety holder and the other half of the deceased spouse devolves on his/her heirs. In fact, Article 1444 of the Civil Code relied on by the Court reads as follows :-

> " After the divorce or separation of persons or annulment of the marriage have been decreed by the court, the spouses may partition the properties by public deed or by act drawn in the file wherein the judgment is pronounced. "

The Court thus considered it appropriate to reject the plaint under Order VII, Rule 11(a) and also (d) of the C.P.C.

5. Mr. D'Costa, the learned counsel for the appellant submitted that the plaint could not have been rejected since the only ground under (a), on which a plaint can be rejected is if it does not disclose cause of action. According to the learned counsel, if in fact, the plaintiff has a cause of action, but that cause of action is not disclosed, the plaint cannot be rejected in such circumstances.

6. I do not see any merit in this submission. Order VII, Rule 11(a) provides that

a plaint shall be rejected inter alia where it does not disclose a cause of action. In my view it would be of no avail to the plaintiff to contend that there was a cause of action and therefore the Court should not reject the plaint, even if the plaint does not disclose a cause of action.

There is no point in allowing the plaintiff to claim that he has a cause of action, which though not disclosed in the plaint, should be taken into account when the Court decides a matter under Order VII, Rule 11.

7. Mr. D'Costa, the learned counsel for the appellant, further submitted that the Court could have seen that the plaintiff had a cause of action under Article 33 which reads as follows:-

> " On contracting a new marriage the spouse who provides the maintenance is not exempted from this obligation towards the other spouse, and it shall not afford him/her a ground for seeking reduction under the provisions of Article 31. "

8. According to the learned counsel this was a case where the marriage was declared void due to the fault of one of the spouses i.e. the defendant and therefore in such a case the defendant was not entitled to any of the benefits availed from the plaintiff including the right of residence and a share in the property. The learned counsel however fairly admitted that there is no pleading to that effect in the suit, but

submitted that an opportunity should have been given to the plaintiff to amend the plaint. Apparently, no application for amendment of the plaint was moved by the plaintiff at any stage. Clearly this was a matter which was required to be pleaded since it involved a statement of fact that is that the marriage was declared null and void due to the fault of the defendant, which would then have to be established.

In the circumstances, I see no merit in this appeal which is hereby dismissed.

S. A. BOBDE, J.

sl.